Asia Plywood Co Sdn Bhd v Aeon Co (M) Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCVC-1425–09 OF 2014
ALIZA SULAIMAN JC
26 JULY 2019

Damages — Assessment — Damages for failing to withdraw private caveat — Whether plaintiff had proven loss of opportunity to sell its land to third party because of defendant's private caveat — Whether plaintiff's computation of loss should have been accepted by Deputy Registrar ('DR') at hearing for assessment of damages — Whether DR erred in revisiting issue of whether defendant's caveat actually caused plaintiff loss as that issue was already determined by Judge earlier — Whether plaintiff would be unjustly enriched if it was awarded amount for loss in value of land in addition to loss of interest it would have earned on purchase price if it had sold land to third party — Whether DR erred in dismissing plaintiff's notice for assessment of damages

Pursuant to a sale and purchase agreement ('SPA') for the sale of the plaintiff's land to the first defendant ('Aeon'), Aeon entered a private caveat on the land. Due to the non-fulfillment of certain conditions precedent under the SPA, the agreement lapsed but Aeon failed to withdraw its caveat. Aeon only withdrew the caveat on 3 May 2016 — about one year and eight months after the plaintiff had filed the instant originating summons ('OS') to remove the caveat. On hearing the OS, the court found that Aeon had no reasonable cause to maintain the caveat after the SPA had lapsed and pursuant to s 329 of the National Land Code ordered Aeon to pay damages to the plaintiff as assessed by the court's deputy registrar ('DR'). The Court of Appeal ('COA') affirmed the decision and further ordered that damages should be assessed between the period 8 August 2014 and 3 May 2016. After hearing the parties on the assessment of damages, the DR dismissed the plaintiff's claim on finding that it had not proven any loss or damages suffered by the existence of Aeon's caveat. The instant proceeding was the plaintiff's appeal to the judge in chambers against the DR's decision. The plaintiff submitted that the DR's decision was wrong because she had no power or jurisdiction to dismiss the application for assessment of damages as that act undermined the High Court judge's order (as varied by the COA) for the damages to be assessed. The plaintiff also argued that it had adduced sufficient documentary and oral evidence before the DR to prove its claim for RM11,600,634.50 on the basis that, if not for Aeon's caveat, it would have sold the land to an interested party ('IPGB') for RM52,690,560 (at RM60 per sqft) by 8 August 2014. The plaintiff had tendered in evidence a letter dated 22 July 2014 ('exh P1') it received from a real estate agency stating that there was an interested buyer for the land at that price. The plaintiff

explained that its claim for the RM11,600,634.50 was made up of: (a) the total interest (RM2,310,805.53) it would have earned at 3.1% pa from placing 98% of the said purchase price on fixed deposit if the sale to IPGB had gone through; (b) the diminution (RM9,190,560) in the value of the land between 8 August 2014 and 3 May 2016; and (c) the fees (RM99,269) it had paid a registered property valuer for its services. The DR had ruled, inter alia, that: (i) the plaintiff had not produced evidence of any agreement it had signed with a prospective buyer of the land between the period 8 August 2014 and 3 May 2016; that merely tendering exh P1 was insufficient to show the plaintiff had suffered loss; (ii) the plaintiff's computation of its loss was mere supposition because the category of the land's use was 'agriculture' and IPGB's witness had testified that IPGB would not have paid RM60 per sqft to acquire agricultural land whose market value then was three times lesser than that amount; and (iii) the valuation reports showed that the plaintiff had benefitted from the appreciation in value of the land between 2014 and 2016, yet it did not take steps to sell the land even after Aeon withdrew its caveat.

Held, allowing the appeal, setting aside the DR's decision and allowing the plaintiff's assessment of damages in the sum of RM2,410,074.53:

(1) The plaintiff had produced ample evidence before the DR to prove on balance of probabilities that it had suffered actual damages, which were reasonably foreseeable, in the form of loss of opportunity to sell the land to IPGB because of Aeon's caveat. The court accepted the plaintiff's computation that if it had sold the land to IPGB, it would have earned RM2,310,805.53 as interest at 3.1%pa from placing 98% of the purchase price in fixed deposit. Aeon did not rebut the interest rate used by the plaintiff. The RM99,269 the plaintiff had paid Henry Butcher Malaysia (Kedah) Sdn Bhd (exh P5) to obtain a report and valuation of the land was also allowed (see paras 26, 49 & 70).

(2) The plaintiff's claim for RM9,190,560 as diminution in the value of the land was not allowed. The damages claimed by the plaintiff was not for a cause of action in tort but premised upon s 329(1) of the National Land Code. The purpose of the damages was to compensate the plaintiff and not to unjustly enrich it. Since the court had allowed the plaintiff's claim for interest it could have earned if it had sold the land to IPGB, the claim for diminution in value of the land could not be allowed lest the plaintiff reaped a windfall at Aeon's expense (see para 75).

(3) The DR erred in deciding that the plaintiff suffered no loss or damage because there was no evidence of an SPA having been signed between the plaintiff and IPGB between 8 August 2014 and 3 May 2016. The DR failed to appreciate that no right-minded party would have signed an SPA when a caveat existed on the land. The witness statements of PW1 and PW2 showed that IPGB was prepared to wait up to three months for the

caveat to be removed, but when it became uncertain when the caveat would be removed, it gave up its decision to buy the land (see para 46).

(4) The DR was clearly influenced in her decision by that part of PW2's testimony where he said that IPGB would not have offered RM60 per square foot to buy agricultural land. However, if the DR had considered PW2's evidence in its totality, it was obvious that such an offer for the plaintiff's land was made by IPGB following a feasibility study that showed that the company could make a reasonable profit from the commercial development of the land. PW2's reasons for not being able to produce the feasibility study before the DR were logical and acceptable. PW2's evidence that IPGB would have asked the plaintiff to convert the land's use to 'commercial' if the sale had gone through was also not unusual or startling but normal practice in the business/commercial world. It did not lie in Aeon's mouth to insist that the land should have been valued and sold as agricultural land with absolutely nil consideration on its potential to be used for commercial purposes. The correct question to ask was not whether IPGB's offer was a final one but whether the plaintiff could have sold the land at RM60 per sqft. The evidence before the DR supported the conclusion that RM60 per sqft was indeed the minimum price the plaintiff would have sold the land for during the period between 8 August 2014 and 3 May 2016 since that was the only offer it received by way of exh P1. IPGB was willing to wait up to a maximum of three months for the caveat to be removed. Since the caveat was not withdrawn until 3 May 2016, the plaintiff lost the opportunity of selling the land to IPGB (see paras 59 & 61–62).

(5) By framing the first issue in the assessment of damages as 'whether the plaintiff had suffered any loss as a result of the existence of Aeon's caveat', the DR erred and misdirected herself because she had revisited the question of liability which the High Court judge had already considered and found that exh P1 showed prima facie that the plaintiff had suffered loss in not being able to sell its land to IPGB because of Aeon's caveat. It was safe to conclude that the High Court was satisfied that the plaintiff had proven on balance of probabilities that it had suffered damages/loss as a result of the caveat. Furthermore, the COA had affirmed the High Court's decision and fixed the period of assessment of damages. Issues which had been litigated and decided prior to the assessment of damages should not have been revisited (see paras 40–41 & 43–44).

[Bahasa Malaysia summary

Berikutan satu perjanjian jual beli ('PJB') untuk jualan tanah plaintif kepada defendan pertama ('Aeon'), Aeon telah memasukkan kaveat persendirian ke atas tanah tersebut. Akibat prasyarat-syarat tertentu tidak dipenuhi di bawah PJB tersebut, perjanjian itu telah luput tetapi Aeon telah gagal untuk menarik balik kaveatnya. Aeon hanya menarik balik kaveat itu pada 3 Mei 2016 —

lebih kurang setahun dan lapan bulan selepas plaintif memfailkan saman pemula ini ('SP') untuk membatalkan kaveat itu. Semasa mendengar SP itu, mahkamah mendapati Aeon tidak mempunyai sebab munasabah untuk mengekalkan kaveat itu selepas PJB tersebut luput dan menurut s 329 Kanun Tanah Negara telah memerintahkan Aeon untuk membayar ganti rugi kepada plaintif sebagaimana ditaksirkan oleh timbalan pendaftar mahkamah ('TP'). Mahkamah Rayuan ('MR') mengesahkan keputusan itu dan selanjutnya memerintahkan agar ganti rugi patut ditaksir antara tempoh 8 Ogos 2014 dan 3 Mei 2016 Selepas mendengar pihak-pihak tentang taksiran ganti rugi, TP telah menolak tuntutan plaintif kerana mendapati bahawa ia tidak membutikan apa-apa kerugian atau kerosakan dialami dengan kewujudan kaveat Aeon itu. Prosiding ini adalah rayuan plaintif kepada hakim dalam kamar terhadap keputusan TP plaintif berhujah bahawa keputusan TP adalah salah kerana beliau tidak mempunyai kuasa atau bidang kuasa untuk menolak permohonan taksiran ganti rugi kerana tindakan itu menjejaskan perintah hakim Mahkamah Tinggi (sepertimana diubah oleh MR) untuk ganti rugi ditaksir. Plaintif juga berbhujah bahawa ia telah mengemukakan keterangan dokumentar dan lisan yang mencukupi di hadapan TP untuk membuktikan tuntutannya sebanyak RM11,600,634.50 atas dasar bahawa, jika bukan kerana kaveat Aeon, ia telah menjual tanah tersebut kepada pihak berkepentingan ('IPGB') sejumlah RM11,600,634.50 (pada kadar RM60 setiap kaki persegi) menjelang 8 Ogos 2014. Plaintif telah mengemukakan keterangan sepucuk surat bertarikh 22 Julai 2014 ('eksh P1') yang diterimanya dari agen hartanah yng mengatakan bahawa terdapat pembeli yang berminat dengan tanah itu pada harga tersebut. Plaintif telah menjelaskan bahawa tuntutannya sejumlah RM11,600,634.50 terdiri daripada: (a) jumlah faedah (RM2,310,805.53) ia akan diperoleh pada kadar 3.1% setahun daripada meletakkan 98% daripada harga pembelian tersebut pada simpanan tetap sekiranya penjualan kepada IPGB telah selesai; (b) penurunan (RM9,190,560) pada nilai tanah antara 8 Ogos 2014 dan 3 Mei 2016 dan; (c) fi (RM99,269) yang telah dibayarnya kepada penilai hartanah berdaftar untuk perkhidmatannya. TP telah memutuskan, antara lain, bahawa: (i) plaintif tidak mengemukakan keterangan tentang apa-apa perjanjian yang telah ditandatanganinya dengan bakal pembeli tanah tersebut antara tempoh 8 Ogos 2014 dan 3 Mei 2016; bahawa hanya dengan mengemukakan eksh P1 tidak mencukupi untuk menunjukkan plaintif telah mengalami kerugian; (ii) pengiraan kerugian yang dinyatakan oleh plaintif adalah anggapan semata-mata kerana kategori penggunaan tanah tersebut adalah 'pertanian' dan saksi IPGB telah memberi keterangan bahawa IPGB tidak akan membayar RM60 setiap kaki persegi untuk memperoleh tanah pertanian yang nilai pasarannya tiga kali lebih rendah daripada jumlah itu; dan (iii) laporan penilaian menunjukkan bahawa plaintif telah mendapat manfaat daripada kenaikan nilai tanah antara tahun 2014 dan 2016, namun ia tidak mengambil langkah untuk menjual tanah itu walaupun setelah Aeon menarik balik kaveatnya.

Diputuskan, membenarkan rayuan, mengetepikan keputusan TP dan membenarkan taksiran ganti rugi plaintif berjumlah RM2,410,074.53:

(1) Plaintif telah mengemukakan keterangan yang mencukupi di hadapan TP untuk membuktikan atas imbangan kebarangkalian bahawa ia telah mengalami ganti rugi sebenar, yang boleh dijangkakan secara munasabah, dalam bentuk kehilangan peluang untuk menjual tanah itu kepada IPGB kerana kaveat Aeon. Mahkamah menerima pengiraan plaintif bahawa jika ia telah menjual tanah itu kepada IPGB, ia akan memperoleh RM2,310,805.53 sebagai faedah pada kadar 3.1% setiap tahun daripada meletakkan 98% harga belian dalam deposit tetap. Aeon tidak membantah kadar faedah yang digunakan oleh plaintif. Jumlah RM99,269 yang dibayar oleh plaintif kepada Henry Butcher Malaysia (Kedah) Sdn Bhd (eksh P5) untuk memperoleh laporan dan penilaian tanah itu juga telah dibenarkan (lihat perenggan 26, 49 & 70).

(2) Tuntutan plaintif untuk RM9,190,560 sebagai pengurangan nilai tanah tidak dibenarkan. Ganti rugi yang dituntut oleh plaintif bukan untuk kausa tindakan dalam tort tetapi berdasarkan s 329(1) Kanun Tanah Negara. Tujuan ganti rugi tersebut adalah untuk memberi pampasan kepada plaintif dan bukan untuk memperkayakannya secara tidak adil. Oleh kerana mahkamah telah membenarkan tuntutan plaintif untuk faedah yang dapat diperolehnya jika menjual tanah itu kepada IPGB, tuntutan untuk penurunan nilai tanah tidak dibenarkan supaya plaintif meraih durian runtuh daripada Aeon (lihat perenggan 75).

(3) TP terkhilaf dalam memutuskan bahawa plaintif tidak mengalami apa-apa kerugian atau kerosaka kerana tiada keterangan tentang PJB itu telah ditandatangani antara plaintif dan IPGB antara 8 Ogos 2014 dan 3 Mei 2016. TP telah gagal untuk memahami bahawa tiada pihak yang berakal akan menandatangani PJB itu apabila terdapat kaveat atas tanah tersebut. Kenyataan saksi PW1 dan PW2 menunjukkan bahawa IPGB telah bersedia untuk menunggu sehingga tiga bulan untuk kaveat itu dibatalkan, tetapi apabila tiada kepastian bila kaveat itu akan dibatalkan, ia telah membuat keputusan untuk tidak membeli tanah tersebut (lihat perenggan 46).

(4) TP jelas dipengaruhi oleh keputusannya oleh bahagian keterangan PW2 yang mana dia mengatakan bahawa IPGB tidak akan menawarkan RM60 per kaki persegi untuk membeli tanah pertanian. Namun, jika TP telah mempertimbangkan keseluruhan keterangan PW2, jelas bahawa tawaran seperti itu untuk tanah plaintif dibuat oleh IPGB berikutan kajian kebolehlaksanaan yang menunjukkan bahawa syarikat itu dapat memperoleh keuntungan yang munasabah daripada pembangunan komersial tanah tersebut. Sebab-sebab PW2 tidak dapat mengemukakan kajian kebolehlaksanaan di hadapan TP adalah logik dan boleh diterima. Keterangan PW2 bahawa IPGB akan meminta plaintif untuk menukar

penggunaan tanah itu menjadi 'komersial' jika penjualan tersebut berlaku juga ukan suatu yang tidak biasa atau mengejutkan tetapi merupakan amalan biasa dalam dunia perniagaan/komersial. Ia tidak terletak pada Aeon untuk menegaskan bahawa tanah itu seharusnya dinilai dan dijual sebagai tanah pertanian tanpa mempertimbangkan sama sekali mengenai potensinya untuk digunakan bagi tujuan komersial. Persoalan yang betul untuk ditanyakan bukanlah apakah tawaran IPGB adalah yang terakhir tetapi adakah plaintif dapat menjual tanah tersebut dengan harga RM60 setiap kaki persegi. Keterangan di hadapan TP menyokong kesimpulan bahawa RM60 setiap kaki persegi sememangnya harga minimum untuk plaintif menjual tanah tersebut dalam tempoh antara 8 Ogos 2014 dan 3 Mei 2016 kerana itu adalah satu-satunya tawaran yang diterima melalui eksh P1. IPGB bersedia menunggu hingga tiga bulan maksimum agar kaveat itu dibatalkan. Oleh kerana kaveat itu tidak ditarik balik sehingga 3 Mei 2016, plaintif telah hilang peluang menjual tanah tersebut kepada IPGB (lihat perenggan 59 & 61–62).

(5) Dengan membuat isu pertama dalam taksiran ganti rugi sebagai 'whether the plaintiff had suffered any loss as a result of the existence of Aeon's caveat', TP telah terkhilaf dan salah arah kerana beliau telah menyemak semula persoalan liabiliti yang mana hakim Mahkamah Tinggi telahpun mempertimbangkan dan mendapati bahawa eksh P1 menunjukkan prima facie bahawa plaintif telah mengalami kerugian kerana tidak dapat menjual tanahnya kepada IPGB disebabkan kaveat Aeoan. Ia selamat untuk membuat kesimpulan bahawa Mahkamah Tinggi berpuas hati bahawa plaintif telah membuktikan atas imbangan kebarangkalian bahawa ia telah mengalami kerugian/kehilangan akibat kaveat tersebut. Selanjutnya, MR telah mengesahkan keputusan Mahkamah Tinggi dan menetapkan tempoh taksiran untuk gant rugi. Isu-isu yang diadili dan diputuskan sebelum pentaksiran ganti rugi tidak patut disemak semula (lihat perenggan 40–41 & 43–44).]

Cases referred to

Abric Project Management & Anor v Palmshine Plaza Sdn Bhd & Anor [2007] 5 MLJ 685, HC (refd)

Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd [2018] 5 MLJ 255; [2018] 1 LNS 474, CA (refd)

Antonina Marleen Yarendra v Chai Wei Chung [2017] 4 MLJ 359, CA (refd)

Armory v Delamirie (1722) 1 Str 505 (refd)

Chaplin v Hicks [1911] 2 KB 786, CA (refd)

Coke & Coal Products (M) Sdn Bhd v Hon Swee Kong & Ors [1999] 4 MLJ 453, HC (refd)

Dodd Properties (Kent) Ltd and another v Canterbury City Council and others [1980] 1 All ER 928, CA (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Emas Kiara Sdn Bhd v Michael Joseph Monteiro (receiver and manager of Lembah Beringin Sdn Bhd) & Ors (Farcoll Estate Sdn Bhd & Ors, interveners) [2018] 5 MLJ 54; [2018] 8 CLJ 17, CA (refd)
Fearns (t/a Autopaint International) v Anglo-Dutch Paint & Chemical [2010] EWHC 1708 (Ch); [2010] All ER (D) 100 (Jul), ChD (refd)
Hillpalm Pty Ltd v Wilson [2009] NSWSC 362, SC (refd)
Hollebone v Midhurst and Fernhurst Builders Ltd and Eastman and White of Midhurst Ltd [1968] 1 Lloyd's Rep 38, QBD (distd)
Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70, FC (refd)
Ladd v Marshall [1954] 3 All ER 745, CA (refd)
Liew Choy Hung v Shah Alam Properties Sdn Bhd [1997] 2 MLJ 309, SC (refd)
Livingstone v The Rawyards Coal Company (1880) 5 App Cas 25, HL (refd)
Malayan Banking Bhd v Lim Poh Ho & Anor [1997] 1 MLJ 662, CA (refd)
Mawar Biru Sdn Bhd v Lim Kai Chew [1992] 1 MLJ 336, HC (distd)
Metroniaga Sdn Bhd v Negara Properties Builders Sdn Bhd [2014] 1 LNS 1325, CA (refd)
Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd [2003] 1 MLJ 6, CA (refd)
Ng See Chong v Tan Lai Meng & Ors [2017] 9 MLJ 421, HC (refd)
Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor [2008] 4 MLJ 157, CA (refd)
Othman bin Ali & 290 Lagi v Bukit Lenang Development Sdn Bhd [2016] MLJU 242; [2016] 6 CLJ 508, CA (refd)
Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai & Anor and other appeals [2018] 4 MLJ 461; [2018] 4 CLJ 323, CA (refd)
Subbiah Reddy and another appeal v T Jardon AIR (32) 1945, PC (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)
The Owners of the Steamship 'Mediana' v The Owners, Master and Crew of the Lightship 'Comet' [1900] AC 113, HL (refd)
Ting Sieh Chung v Hock Peng Realty Sdn Bhd [2013] 2 MLJ 90, CA (refd)

Legislation referred to

National Land Code ss 52(1), 116(1)(a), (4)(b), 329, 329(1)
Rules of Court 2012 O 37, O 37 r 1, O 56 r 1

Lim Choon Khim (Chin Yan Leng with him) (Chooi, Saw & Lim) for the plaintiff.
Doshi Jyotsana (R Jayasingam with her) (BH Lawrence & Co) for the defendant.

Aliza Sulaiman JC:

INTRODUCTION

[1] The plaintiff had, vide a notice of application dated 17 August 2016 (encl 24), applied for an assesment of damages by the Registrar, as against the first defendant under O 37 r 1 Rules of Court 2012 ('the ROC 2012'). The order for assessment of damages against the first defendant was made by the High Court on 5 August 2016 upon a finding that the first defendant had no reasonable cause to maintain its private caveat on the plaintiff's land and that the legal requirements under s 329 National Land Code (Act 56 of 1965) ('the NLC') have been fulfilled. Subsequently, on 30 March 2017, the Court of Appeal had ascertained the period of assessment to be between 8 August 2014 and 3 May 2016.

[2] The assessment of damages was heard by the learned deputy registrar ('DR') on 18 and 19 April 2018 and 17 May 2018. The DR delivered her decision on 16 August 2018 where she found that the plaintiff had failed to prove the loss allegedly suffered and thereby the plaintiff's application was dismissed with cost to be borne by each party.

[3] Being dissatisfied, the plaintiff appealed to the judge in chambers against the DR's decision vide a notice of appeal dated 24 August 2018 (encl 102).

[4] Having had the benefit of clarification by learned counsels for the plaintiff and the first defendant on several issues on 22 January 2019 and having read the learned DR's grounds of judgement ('GOJ') dated 8 February 2019, the cause papers and all written submissions filed including the more recent submissions filed in March 2019, I allowed the plaintiff's appeal on 22 March 2019 whereby the DR's decision was set aside and the total amount of RM2,410,074.53 was awarded as damages to the plaintiff. An order as to cost was also made in the sum of RM20,000 to the plaintiff for the assessment proceeding before the DR and this appeal.

[5] Both the plaintiff and the first defendant now appeal against the said order of the court. The plaintiff is discontented with part of my decision where I disallowed the plaintiff's claim for the diminution of the value of land in the amount of RM9,190,560 whilst the first defendant is aggrieved by other aspects of the order as above stated.

[6] These are my full grounds in arriving at the conclusion as I did on the issues which arose in the appeal. The parties shall be referred to as they are named in the originating summons.

SALIENT BACKGROUND FACTS

[7] The relevant facts pertaining to the dispute between the parties have been succinctly outlined in the GOJ of John Louis O'Hara J dated 28 October 2016 in respect of the decision delivered on 5 August 2016. The said judgment has certainly assisted this court in understanding the historical context of the matter and some passages from the same, which are related to the factual background for purposes of this appeal, are repeated herein below on a selective basis.

[8] The plaintiff is the registered and beneficial owner of a piece of freehold land measuring approximately 8.162 hectares or 20.168 acres held under GRN 181086, Lot No 2834, Seksyen 47, Bandar Sungai Petani, District of Kuala Muda, State of Kedah ('the said land'). On 3 June 2011, the plaintiff and the first defendant entered into a sale and purchase agreement ('SPA') wherein the plaintiff agreed to sell and the first defendant agreed to purchase the said land for the purchase price of RM36,019,241.28 for the purpose of operating the business of shopping centres and departmental stores cum supermarkets.

[9] Clause 2.1 in the SPA stipulates that the sale and purchase of the said land shall be subject to, and is conditional upon, the fulfillment of the conditions precedent as provided in paras (a)–(f) of cl 2.1. Clause 2.2 states the consequences of non-fulfillment of the conditions precedent within the time period as laid down in the SPA. The relevant part of cl 2.2 is as follows:

> In the event that any of the Conditions Precedent referred to in Clause 2.1 above is not fulfilled SAVE AND EXCEPT Clause 2.1(f), by the expiry of the Conditional Period or such other extended period as may be mutually agreed upon, either party shall be entitled to terminate this Agreement by serving a written notice to the other party whereupon the Vendor shall within fourteen (14) days from the date of receipt of such written notice refund or cause to be refunded to the Purchaser all monies paid towards account of the Purchase Price together with interest accrued on the fixed deposit account placed by the Stakeholders and the Purchaser shall in exchange thereof:
>
> (i) ...
>
> (ii) ...
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> (iii) withdraw any private caveat or other encumbrances lodged by the Purchaser or for and on their behalf against the Sale Property at their own costs and expenses;
>
> (iv) ....
>
> (v) ...
>
> thereafter, this Agreement shall terminate and cease to have any effect and neither party shall have any further claim against the other party or any matter in respect of or arising from this Agreement save and except for any antecedent breach that has

A been committed and the Vendor shall be at liberty to sell the Sale Property to any third party without any reference to the Purchaser.

B **[10]** The first defendant had entered a private caveat on the said land on 4 July 2011 under Registration No 4229/2011. Thereafter, the plaintiff issued a letter to the first defendant claiming that the SPA has lapsed as the conditions precedent have not been complied with and refused to agree to any further extension of time.

C **[11]** The first defendant then filed Originating Summons No 24NCC-375–10 of 2012 ('OS 375') for specific performance against the plaintiff. On 2 September 2013, the court allowed a conditional decree for specific performance by granting an extension of six months for the plaintiff to fulfill the conditions precedent. The court also held that if the conditions precedent were not fulfilled by 2 March 2014, the SPA would lapse and become void.

D

[12] The conditions precedent could not be fulfilled by the said date. The first defendant again applied to the court under OS 375 for a further extension of six months. This application was dismissed by the court on 7 July 2014. The first defendant then appealed to the Court of Appeal.

E

[13] Later, more precisely on 8 December 2014, the same sequence of events was repeated whereby the first defendant filed yet another application for an extension of six months. This application was dismissed by the court on 15 January 2015 and the first defendant appealed to the Court of Appeal.

F

[14] The Court of Appeal dismissed both the aforementioned appeals on 29 March 2016. As stated by John Louis O'Hara J in His Lordship's judgment, '10. ... This Court sees the reasoning and logic behind the Court of Appeal's dismissal of the first defendant's appeals in that it would be wrong for a Court to grant an extension for compliance in regard to a SPA that had lapsed and become void ...'.

G

H **[15]** Meanwhile, on 26 September 2014, the plaintiff filed this originating summons to remove the first defendant's caveat and for other ancillary reliefs. *The first defendant withdrew its caveat on 3 May 2016*. John Louis O'Hara J granted the following order on 5 August 2016:

I

1. *Bahawa satu perintah gantirugi terhadap defendan pertama diberikan dan gantirugi tersebut ditaksirkan di hadapan Timbalan Pendaftar*; dan
2. Bahawa Defendan Pertama hendaklah membayar kos sebanyak RM7,500.00 kepada Plaintif.
3. Fi alokatur adalah sebanyak 4% daripada jumlah kos. (Emphasis added.)

[16] The first defendant lodged an appeal to the Court of Appeal in respect of the above decision. The appeal was heard on 30 March 2017 where the Court of Appeal pronounced that:

(a) Rayuan perayu adalah ditolak;

(b) *Perayu hendaklah membayar gantirugi kepada responden dan gantirugi tersebut hendaklah ditaksirkan dari tarikh 8.8.2014 hingga 3.5.2016 di hadapan Timbalan Pendaftar*;

(c) Perayu hendaklah membayar kos sebanyak RM10,000.00 kepada responden.

(d) Deposit sebanyak RM1,000.00 dikembalikan kepada perayu. (Emphasis added.)

[17] As mentioned earlier, the hearing of the assessment of damages before the DR was held on 18 and 19 April 2018 and 17 May 2018. Four witnesses testified for the plaintiff, namely:

(a) Lee Ann Nee, Real Estate Negotiator from EDBiD Properties Sdn Bhd ('EPSB') (PW1);

(b) Lee Chin Aik, Personal Asistant to Dato' Low Eng Hock, Group Chief Executive Officer of Ivory Properties Group Bhd ('IPGB') (PW2);

(c) Tan Boon Huat, the plaintiff's managing director (PW3); and

(d) Sr Mah Beng Fong, Registered Valuer and Resident Director of Henry Butcher Malaysia (Kedah) Sdn Bhd as the plaintiff's expert witness (PW4).

[18] The first defendant called two witnesses; Mahadzir bin Isa, also a registered valuer and estate agent, and the Sungai Petani Branch Manager for Rahim & Co International (DW1) and Cheong Sook Kwan, the first defendant's manager of development and property management (DW2).

[19] The outcome of the said hearing was not in the plaintiff's favour and thus, the appeal before this court. According to encl 102, the plaintiff sought the following orders from this court:

(1) the decision of the Deputy Registrar given on 16 August 2018 be set aside;

(2) consequential upon prayer (1) above, a fair and reasonable amount to be ascertained and awarded as damages to the plaintiff pursuant to the order of this Honourable Court dated 5 August 2016 and the order of the Court of Appeal dated 30 March 2017;

(3) alternatively, damages as ordered by this Honourable Court by the Order dated 5 August 2016 and as varied by the Court of Appeal by its Order dated 30 March 2017 be re-assessed before the learned Judge;

(4) costs of this appeal be borne by the first defendant; and

(5) such other or further order be given as this Honourable Court deems just and proper.

THE DR'S GROUNDS OF JUDGMENT

[20] Upon closer scrutiny of the initial written submissions filed in November and December 2018 by learned counsels for the plaintiff and first defendant, it is evident that both parties are relying on the non-production of the DR's GOJ as one of the reasons to support their respective arguments. However, the notes of proceedings for the case management held on 14 September 2018 before the same DR who heard the trial on assessment of damages shows that the plaintiff's counsel had informed the DR that her GOJ is not necessary because it is an appeal to the judge in chambers. The first defendant agreed to this.

[21] Order 56 r 1 ROC 2012 on 'Appeals from certain decisions of Registrar of the High Court to a Judge in Chambers' does not contain any express requirement for the DR's GOJ to be provided. Yet, in the plaintiff's written submission dated 1 November 2018, it was submitted that, despite the decisions of the High Court on 5 August 2016 and the Court of Appeal on 30 March 2017, 'the deputy registrar dismissed the application for assessment of damages after the completion of a full evidentiary hearing before her. No reasons for decision were given by her. It is, with respect, a non-speaking decision'.

[22] The plaintiff's position on this matter was clarified on 22 January 2019 whereupon both counsels for the plaintiff and first defendant agreed that the DR's GOJ should be obtained so that this appeal is properly heard and decided. According to Dato' Lim Choon Khim, junior counsel who had attended the CM on 14 September 2018 did not say that the GOJ is not needed and it was the DR that said no GOJ will be provided.

[23] In any event, and since the position of the parties had been made clear, I then directed the DR to prepare her GOJ and for learned counsels to file additional submissions with reference to the GOJ and the supplementary issues raised during the clarification session.

THE PLAINTIFF'S SUBMISSIONS

[24] The plaintiff submitted that the assessment proceeding was conducted pursuant to O 37 of the ROC 2012 which does not provide for the dismissal of a claim for damages after the completion of evidentiary hearing. Hence, the primary complaint in the present appeal is that the DR had no power or

jurisdiction to dismiss the assessment application. In doing so, the DR had undermined the order made by the High Court on 5 August 2016, which was subsequently varied by the Court of Appeal on 30 March 2017. The DR's judicial task was to assess the quantum of damages and she erred in law in dismissing the assessment application. A serious miscarriage of justice has been occasioned. On this ground alone, it was submitted that the decision of the DR ought to be set aside.

[25] On the issue of assessment of damages, the plaintiff's counsel relied on the following principles of law:

(a) the assessment of damages or compensation is not an exact science. Nonetheless, quoting Vaughan Williams LJ in *Chaplin v Hicks* [1911] 2 KB 786, 'The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of paying damages';

(b) the purpose of damages is 'to put the injured party in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation' (with reference to Lord Backburn in *Livingstone v The Rawyards Coal Company* (1880) 5 App Cas 25 (HL) and Donaldson LJ in *Dodd Properties (Kent) Ltd and another v Canterbury City Council and others* [1980] 1 All ER 928 as quoted in *Liew Choy Hung v Shah Alam Properties Sdn Bhd* [1997] 2 MLJ 309) and 'to give the injured party the market value of the benefit of which he has been deprived through the breach' (Harvey McGregor, *McGregor on Damages* (17th Ed, 2003 at para 2-002 p 29);

(c) when assessing damages or compensating, the court is required to resolve uncertainties, if any, by making assumptions generous to the plaintiff: *Armory v Delamirie* (1722) 1 Str 505 and *Fearns (t/a Autopaint International) v Anglo-Dutch Paint & Chemical* [2010] EWHC 1708 (Ch); [2010] All ER (D) 100 (Jul); and

(d) the principles governing an assessment of damages in a case of a breach of contract are likewise applicable to a case in tort and under s 329 of the NLC: *Dodd Properties (Kent) Ltd*; *Ng See Chong v Tan Lai Meng & Ors* [2017] 9 MLJ 421 and the decision of the Court of Appeal in *Antonina Marleen Yarendra v Chai Wei Chung* [2017] 4 MLJ 359.

[26] It was further contended that based on the evidence adduced at the hearing of the assessment, the plaintiff had successfully proven its claim for damages amounting to *RM11,600,634.50* calculated as follows:

(a) of the first defendant had withdrawn the private caveat, the plaintiff could have entered into a SPA with IPGB by 8 August 2014 for the price of RM52,690,560 (ie RM60per sqft). 10% of that sum would have been received by the plaintiff upon signing of the agreement. Out of the 10%,

2% thereof would have been payable to PW1 as commission whilst the balance 8% would have been deposited in a fixed deposit account so as to accumulate interest at the rate of 3.1%pa;

(b) the balance 90% of the purchase price ie RM47,421,504 would have been received by 8 December 2014 and this amount too, would have been deposited in a fixed deposit account to earn interest at the rate of 3.1%pa;

(c) interest which the plaintiff could have earned, namely:

(i) interest from 8% of the purchase price vis:

RM4,215,244.80 x 3.1% (from 8 August 2014 to 7 August 2015) =RM130,672.60

(RM4,215,244.80 + RM130,672.60 = RM4,345,917.40) x 3.1% / 365 x 270 days (from 8 August 2015 to 3 May 2016) = RM99,658.40

Total: RM130,672.60 + RM99,658.40 = RM230,331;

(ii) interest from 90% of the purchase price vis:

RM47,421,504 x 3.1% (from 8 December 2014 to 7 December 2015) = RM1,470,066.62

(RM47,421,504 + RM1,470,066.62 = RM48,891,570.62) x 3.1% / 365 x 147 days (from 8 December 2015 to 3 May 2016) = RM610,407.91

Total: RM1,470,066.62 + RM610,407.91 = RM2,080,474.53

Thus, the total interest amounts to RM230,331 + RM2,080,474.53 = RM2,310,805.53;

(d) the diminution of the value of the land for the period between 8 August 2014 and 3 May 2016:
RM52,690,560 – RM43,500,000 = *RM9,190,560.00*; and

(e) fees for PW4's services in the sum of *RM99,269.*

[27] Additionally, Dato' Lim Choon Khim submitted that this court should take a pro-interventionist approach in the present appeal because deputy registrars generally have less experience in assessing damages and open court trials as compared to trial judges. In an appeal such as this, the judge is entitled, and indeed bound, to give effect to his/ her own views on matters within his/her competence. Learned counsel cited the case of *Subbiah Reddy and*

another appeal v T Jardon AIR (32) 1945 where the Privy Council considered that the appellate court, in an assessment appeal, is entitled to give effect to its own view on matters within its competence. To hold otherwise would be to deprive parties of the benefit of a right of appeal which they possess.

[28] As regards the concluding part of the plaintiff's submission in reply dated 20 December 2018 that this court is clothed with the powers and jurisdiction to either order a re-hearing of the assessment application, or determine the quantum having regard to the submissions before the court, Dato' Lim Choon Khim clarified that the court need not order a re-trial if it is satisfied that the evidence which has been fairly admitted is sufficient for the court to decide on the quantum of damages to be awarded to the plaintiff. A re-trial should be ordered only if there is a serious gap in the evidence which renders it unsafe to make any finding or decision in respect of the issue on quantum.

[29] The plaintiff's counsel additionally clarified his earlier submission concerning nominal damages. Although the position taken by the plaintiff in this appeal is that there is sufficient evidence to support a finding that the plaintiff has discharged its burden of proof for substantial damages to be awarded, nevertheless if the court takes a different view, then nominal damages in the sum of at least RM900,000, ought to be ordered. Apart from the principles on nominal damages which can be discerned from the authorities in *The Owners of the Steamship 'Mediana' v The Owners, Master and Crew of the Lightship 'Comet'* [1900] AC 113; *Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai & Anor and other appeals* [2018] 4 MLJ 461; [2018] 4 CLJ 323; *Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd* [2018] 5 MLJ 255; [2018] 1 LNS 474; and *Metroniaga Sdn Bhd v Negara Properties Builders Sdn Bhd* [2014] 1 LNS 1325, the justification forwarded by the plaintiff for this amount is that:

(a) the cost incurred in engaging the services of PW4 is *RM99,269*;

(b) even if the said land had been sold as agricultural land at RM21.50 per sqft, the plaintiff could have earned interest from the proceeds of sale calculated as follows:

(i) interest from 8% of the purchase price:

RM1,510,462.72 x 3.1% (from 8 August 2014 to 7 August 2015) = RM46,824.34

(RM 1,510,462.72 + RM 46,824.34 = RM 1,557,287.06) x 3.1% / 365 x 270 days (from 8 August 2014 to 3 May 2016) = RM35,710.94

Total: RM 46,824.34 + RM 35,710.94 = RM82,535.28;

(ii) interest from 90% of the purchase price:

RM16,992,705.60 x 3.1% (from 8 December 2014 to 78 December 2015) = RM526,773.87

(RM16,992,705.60 + RM 526,773.87 = RM17,519,479.47) x 3.1% / 365 x 147 days (from 88 December 2015 to 3 May 2016) = RM218,729.50

Total: RM 526,773.87 + RM 218,729.50 = RM745,503.37

The total interest would thus be RM82,535.28 + RM745,503.37 = RM828,038.65

Based on the above computation, the total figure stands at RM99,269.00 + RM828,038.65 = RM927,307.65.

THE FIRST DEFENDANT'S SUBMISSIONS

[30] Ms Doshi Jyotsana for the first defendant submitted that the DR had rightfully considered s 329 of the NLC which forms the basis for the plaintiff's claim and the decision in *Antonina* which clearly held that the aggrieved party bears the burden of proving liability to pay compensation. The DR had also correctly cited the authorities of *Mawar Biru Sdn Bhd v Lim Kai Chew* [1992] 1 MLJ 336 and *Emas Kiara Sdn Bhd v Michael Joseph Monteiro (receiver and manager of Lembah Beringin Sdn Bhd) & Ors (Farcoll Estate Sdn Bhd & Ors, interveners)* [2018] 5 MLJ 54; [2018] 8 CLJ 17 in her GOJ for the proposition that damages must be real and actual, and that proof of loss or damage suffered has to be shown.

[31] The first defendant further contended that the DR had correctly identified the following issues for purposes of the hearing on assessment of damages and had come to the correct conclusion on these issues based on the overall evidence before her:

(a) whether the plaintiff suffered any loss in view of the existence of the first defendant's caveat;

(b) whether the plaintiff's calculation of its losses is accurate and true; and

(c) whether the plaintiff benefited from the increase in the market price of the said land.

[32] As regards the issue of nominal damages that was posed by the court on 22 January 2019, the first defendant contended that the duty and role of the DR is only to assess the damages. There is nothing in the order of the High

Court dated 5 August 2016 which states that nominal damages can be granted. Therefore, the first defendant argued that it is not open to the plaintiff to pray for nominal damages to be awarded in the event that the court decides that the plaintiff has failed to prove substantial damages. Ms Doshi Jyotsana sought to distinguish the case of *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157 as one concerning breach of a building contract whereas the matter before this court is with respect to an assessment of damages pursuant to s 329 of the NLC. Learned counsel made the same submission as regards the other cases cited by the plaintiff as mentioned in para 29 above. Ultimately, the plaintiff is said to have not proven any loss whatsoever and therefore no nominal damages can be granted.

ANALYSIS AND FINDINGS OF THE COURT

[33] The assessment of damages (encl 24) was heard by the DR pursuant to the provision in O 37 r 1 of the ROC 2012 which reads as follows:

> Assessment of damages by Registrar (O 37 r 1)
>
> 1(1) Where judgement is given for damages to be assessed and no provision is made by the judgement as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgement shall, within one month from the date of judgement, apply to the Registrar for directions and the provisions of Order 34 shall, with the necessary modifications, apply.

[34] It is trite law that the specific finding of facts by the DR as a trier of facts should not be disturbed by this court unless that finding was plainly wrong in light of the fact that in the assessment of damages, the DR had the benefit of an audio-visual advantage which this court did not (see Low Hop Bing JCA in *Ting Sieh Chung v Hock Peng Realty Sdn Bhd* [2013] 2 MLJ 90 at pp 93–94, a case included in the plaintiff's bundle of authorities). The defendant's counsel had additionally cited the authority of *Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd* [2003] 1 MLJ 6 for the proposition that: '... the principles governing an appeal from a registrar to a judge in chambers are now no different from those governing an appeal from a trial on merits from the High Court to this court. On such an appeal to this court, fresh evidence is not admissible unless the conditions set out in *Ladd v Marshall* [1954] 3 All ER 745 are met (see *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70)'.

[35] The other pertinent provision in this appeal is of course s 329 of the NLC which states the following:

> 329 Compensation for wrongful caveats, and limitation on repeated applications.

(1) Any person or body who, or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

[36] It has often been said that the Torrens system emphasises registration of title and interests and does not recognise any unregistered title or interests. One of the accepted function of the private caveat is to 'freeze' the register until the claim being caveated has been perfected by the registration of an instrument, or it has been adjudicated as not being entitled to priority by the court (see Ainul Jaria Maidin, Sharifah Zubaidah Syed Abdul Kader, Bashiran Begum Haji Mubarak Ali, Fauziah Md Noor, Nor Asiah Mohamad, Azlinor Suffian & Ratna Azah Rosli, *Principles of Malaysian Land Law*, LexisNexis, 2008 at pp 372–378).

[37] A claimant relying on sub-s 329(1) of the NLC thus has to prove that: (i) the private caveat entered by the defendant was entered wrongfully or without reasonable cause; and (ii) the claimant had suffered damages or losses as a result of the lodgment of the private caveat. In assessing damages for such wrongful entry of a caveat, real and actual loss must be proved as opposed to what might have been the loss or damage. Compensation under sub-s 329(1) of the NLC can only be awarded for actual damages which were reasonably foreseeable (see Teo Keang Sood & Khaw Lake Tee, *Land Law In Malaysia: Cases and Commentary* (3rd Ed, LexisNexis, 2012) at pp 732–733).

The first issue analysed by the DR: 'Sama ada plaintif mengalami sebarang kerugian dengan kewujudan kaveat defendan pertama tersebut'

[38] The reasoning and finding of the DR can be seen at paras 39–43 of the DR's GOJ. The DR referred to the letter dated 22 July 2014 from EPSB to the plaintiff (exh P1) indicating that there was a prospective purchaser for the said land. The terms and conditions as set out in the said letter was quoted in full in para 34 of the judgment of John Louis O'Hara J. Since the said letter has an important bearing in this appeal, I shall similarly quote a significant part of the same word for word:

> We have since marketed the same extensively and are pleased to inform you that we have offered the said Property to our Prospective Purchaser, and they hereby have expressed keen interest to purchase the said Property at the following terms and conditions:
>
> 1. Price: *Ringgit Malaysia Fifty Two Million Six Hundred Ninety Thousand Five Hundred and Sixty (RM52,690,560.00) only. (@ RM60.00 psf)* (inclusive of transfer/administrative/consent fee which may be payable to the Developer/Penang Development Corporation/Foreign Investment Committee/ State Authority or other relevant Authorities (if any)).

2. Mode of Payment: *10%* of the purchase price payable upon signing of the Sale & Purchase Agreement.

3. Balance Payment: Within *Four (04) month(s)* from the date of Sale & Purchase Agreement/receipt of the necessary written consent from the Developer/Penang Development Corporation/Foreign Investment Committee/State Authority or other relevant Authorities (if any) consenting to the sale with an extension of *Two (02) month(s)* with interest at *8%* per annum calculated on a daily basis.

4. The sale shall be with vacant possession and shall be subject to:

   (i) a good and registrable and marketable title to the said Property;

   (ii) the said Property being free from encumbrances; and

   (iii) the existing furniture and fittings.

5. The Vendor(s)' solicitor's fee shall be borne by you. We also write to inform you that our Agency Fee is 2% of the selling price exclusive of Government Service Tax is payable to us upon execution of Sale & Purchase Agreement ...

[39] In addition, the DR had considered the evidence by PW1 and PW3 and concluded that '... saya mendapati bahawa tiada kontrak muktamad di antara Plaintif dan bakal Pembeli berkenaan sebarang transaksi jual beli Hartanah tersebut di antara tempoh 8 August 2014 sehingga 3 May 2016'. As for the submission by the plaintiff's counsel that exh P1 is sufficient to prove that the plaintiff suffered loss as a result of the first defendant's failure to withdraw the caveat, the DR applied the legal principles as articulated in *Emas Kiara* and opined that the plaintiff's contention is not reasonable because 'Pembatalan tawaran pembelian oleh Bakal Pembeli semata-mata adalah tidak memadai untuk menyimpulkan bahawa plaintiff telah mengalami kerugian'.

[40] It is my considered view that the DR had erred and misdirected herself when she framed the first issue in the assessment of damages in the manner that she did. By doing so, the DR revisited the question of liability when the High Court had already considered the very same letter (exh P1) and made the following finding:

> 35. *This shows that prima facie the Plaintiff had suffered loss in that the Sale could not and had not gone through*. To the mind of this Court it is reasonably foreseeable that *had the 1st Defendant removed his caveat on or before 2.3.2014, the Plaintiff would have sold the Property, which it could not do so because of the continuing caveat*. The actually amount of the loss would have to be assessed by the Timbalan Pendaftar after taking the evidence of the witnesses for the respective parties. *At what minimum price the Plaintiff would have sold the property can only be determined by the evidence taken during the Assessment by the TP*. (Emphasis added.)

[41] The opening paragraphs in the judgment of James Foong JC (as he then

was) in *Mawar Biru Sdn Bhd v Lim Kai Chew* [1992] 1 MLJ 336 narrates that the plaintiff entered into an agreement to purchase a piece of property from the defendant. A caveat was lodged over the said property by the plaintiff, their servant and/or agent. An application for the removal of the said caveat was subsequently filed resulting in an order being granted to that effect by Abu Mansor J who also ordered that damages be awarded against the plaintiff/caveator. There was an appeal to the Supreme Court but it was dismissed. The order made by Abu Mansor J was thus affirmed and the matter came before James Foong JC for assessment of damages for the wrongful lodgment of the caveat. During the hearing, the defendant's counsel submitted that there is no necessity for the defendant to prove that the caveat was wrongfully entered on the said property by the plaintiff as this had already been decided and confirmed by the Supreme Court. It was contended that what was left to be decided is the question of damages as provided under the earlier order and sub-s 329(1) of the NLC. On this point, James Foong JC stated that he was in full agreement. Likewise, I am in agreement with the plaintiff that issues which have been litigated and decided prior to the trial on assessment of damages should not be revisited.

[42] Moving on, the decision of the Court of Appeal in *Antonina*'s case is also insightful. Mary Lim JCA in delivering the judgment of the court at p 370 of the report explained the requirements whenever sub-s 329(1) of the NLC is being invoked:

> [22] Given that s 329(1) itself requires that compensation is only for damage or loss which is 'thereby' suffered, it is evident that *proof of the existence of damage or loss is first of all, required*. The respondent must *prove on a balance of probabilities that he has suffered a particular damage or loss 'thereby' or as a result of, the wrongful act of the appellant*. How is compensation to be ordered unless there is in existence proof of the damage or loss allegedly suffered? *Damage or loss is not presumed for this wrongful act; it must be established in law and on the facts*. If the respondent fails to discharge that burden, the court may either refuse compensation or order nominal compensation to be paid. Until and unless the respondent has discharged that burden, it would be an improper exercise of discretion by the court to order any compensation or assessment. *Until and unless the court is so satisfied, it would be wrong for the court to direct an assessment of the amount, be it by the court itself, or as in this case, by the learned SAR* ... (Emphasis added.)

[43] In the present case, the High Court had ordered that the amount of loss as a result of the continued existence of the private caveat on the said land to be assessed by the DR by hearing the testimony of witnesses on the same. Therefore, it is safe to conclude that the court was satisfied that the plaintiff has discharged the burden to prove on a balance of probabilities that it has suffered a particular damage or loss 'thereby' or as a result of, the wrongful act of the defendant.

[44] Furthermore, the decision by the High Court was affirmed by the Court of Appeal whereupon the Court of Appeal had ascertained that the period for which damages is to be assessed is between 8 August 2014 until 3 May 2016.

[45] Based on the foregoing consideration, there is no doubt whatsoever that the DR had fallen into error in analysing the first issue: a pitfall which could have been avoided had she drafted it to read as 'Whether the Plaintiff had adduced sufficient evidence to discharge the burden to prove the amount of damages claimed'.

[46] The DR fell into further error in concluding that the plaintiff suffered no loss or damage because no sale and purchase agreement was signed between the plaintiff and IPGB in the period from 8 August 2014 until 3 May 2016. Now, it is undisputed that the defendant had the caveat withdrawn on 3 May 2016. What the DR failed to appreciate is the fact that no right-minded party would sign such an agreement when a caveat exists on the said land. PW1's witness statement dated 18 April 2018 clearly explained the chain of events which led to the issuance of the letter (exh P1) and what happened after IPGB was informed about the private caveat on the said land, namely that IPGB would still be prepared to purchase the said land if the private caveat could be removed in three months' time. However, when PW1 told PW2 that it was uncertain when the private caveat could be removed, IPGB decided to discontinue its attempt to purchase the said land. This fact was confirmed by PW2 in his witness statement dated 18 April 2018 as well when he stated that:

> I discussed with Dato' Low. He then decided that there was no point waiting because we wanted to tap on the property market while it was still strong. This is because the economy would be bad in the near future. So I went ahead and told Ann Lee that Ivory would no longer continue with negotiation.

[47] To the question as to whether IPGB is still willing to purchase the said land at RM60 per sqft ('psf'), PW2 replied, 'Of course not. The property market has slowed down substantially. It would be risky to pay that price now'.

[48] In *Ting Sieh Chung*'s case at p 95, it was held, inter alia, that:

> [15] Section 329(1) is also discussed in *National Land Code — Commentary MLJ* [1992] (2nd Ed), at p 766 by Judith Sihombing who opined that, in most cases, 'the loss resulting would be that the caveat had inhibited the sale of the land or caused it to be sold for a lesser price'.
>
> ...
>
> [17] Had the defendant not entered the caveat, the plaintiff would have sold the houses or charged them to a bank to raise funds for purposes of development. These are losses of opportunity arising from the defendant's entry of the caveat which had remained for some eight years before the court ordered its removal.

[49] Applying the same reasoning as above quoted to the facts in the present case, the plaintiff had produced ample evidence at the trial on assessment of damages before the DR to discharge the burden of proof on a balance of probabilities that it had suffered actual damages, which were reasonably foreseeable, in the form of loss of opportunity where, had the first defendant withdrawn the private caveat from the time that it ought to have done so, the plaintiff would have sold the said land to IPGB.

The second issue analysed by the DR: 'Sama ada pengiraan kerugian plaintif adalah tepat dan benar'

[50] The DR's findings on this second issue can be seen in the following paragraph:

> 45) Saya bersetuju dengan hujahan Peguam Defendan Pertama bahawa kiraan Plaintif adalah tidak tepat kerana ianya hanyalah berdasarkan andaian dan anggapan semata-mata. Mahkamah tidak wajar membuat sebarang andaian sedangkan pada hakikatnya sehingga prosiding taksiran ini dijalankan, status Hartanah tersebut masih lagi status pertanian. Laporan penilaian SP4 dan SD1 menunjukkan bahawa status Hartanah tersebut adalah tanah pertanian. Tambahan pula, SP2 mengesahkan bahawa tawaran harga RM60 per kaki persegi pada 21.7.2014 adalah dibuat bagi status tanah komersial dan Bakal Pembeli tidak akan menawarkan harga sebegitu untuk status tanah pertanian.
>
> 46) Memandangkan kiraan asas kerugian Hartanah tersebut telah gagal dibuktikan oleh Plaintif, kiraan faedah yang dibuat juga secara langsung adalah salah. Ini adalah kerana kiraan kepada asas kerugian Plaintif adalah tidak tepat menyebabkan kiraan faedah juga tidak tepat. Maka, saya mendapati bahawa kiraan kerugian Plaintif secara keseluruhannya adalah tidak tepat dan gagal dibuktikan.

[51] The plaintiff submitted that PW2 had given evidence that IPGB had made an offer to purchase the said land at RM60 psf vide IPGB's letter dated 21 July 2014 (exh P2). The offer was communicated to the plaintiff's director through PW1, vide EPSB's letter dated 22 July 2014 (exh 1). Therefore, relying on the following passage from the decision in the case of *Abric Project Management & Anor v Palmshine Plaza Sdn Bhd & Anor* [2007] 5 MLJ 685 at p 693, the price which the prospective purchaser had offered ought to be accepted as the best reflection of the true market value of the said land:

> [31] Further and/or in any event, the true market value of the said land could be better observed from the value attached to them by prospective purchasers as opposed to valuers. In this respect, reference is made to the decision of the Court of Appeal in *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662 wherein it was held that:
>
> > ... the true commercial value of a property is not what a valuer thought it should be, but the actual price that the property would fetch on the open market.

[52] Further, it was submitted by the plaintiff that the court has to ascertain the value of the said land as at 3 May 2016. The evidence clearly showed that there was no prospective purchaser as at 3 May 2016. PW2 said that the market deteriorated subsequent to the period during which IPGB made its offer. IPGB was not prepared or willing to purchase the said land by 2016 because of the poor market sentiments. PW4 opined that, as at 3 May 2016, the said land could fetch a price of either RM33,600,000 (assuming that the said land remains as agriculture land) or RM43,500,000 (on the assumption that the said land is converted for commercial use).

[53] On the other hand, the first defendant argued that no evidence was led by the plaintiff with respect to the price at the material time for agriculture land. In fact, PW2 had stated that IPGB wanted to purchase the said land for the commercial category of land use whereas the category of land use at the material time was for agriculture. Notably PW2 was questioned extensively by the first defendant's counsel during cross-examination on the issue of the offer for the said land at RM60 psf although the category of land use was agriculture. As for the cases cited by the plaintiff ie *Abric Project Management, Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662 and *Hillpalm Pty Ltd v Wilson* [2009] NSWSC 362, the defendant's response is that these cases are not applicable since they do not involve the issue of loss or damage within the framework of sub-s 329(1) of the NLC.

[54] At this stage, it would be useful to refer to the witness statements and notes of proceedings ('NOP') to examine the witnesses' respective testimonies on the matter at hand. At p 25 NOP, PW1 said that she did ask IPGB as to what is the lowest price that the company would be willing to buy the said land, 'I did ask them, they say RM60, yes. That's it'.

[55] PW2's evidence in his witness statement is as follows:

> Q6 . What were your immediate boss's instructions to you?
>
> A6. My immediate boss, Dato' Low Eng Hock, instructed me to look into a piece of land in Sungai Petani owned by the Plaintiff. ... Dato' Low handed me a copy of the Property's land title and told me that he wanted to have it purchased for Ivory's development. So, I then conducted a feasibility study over the Property and concluded that we could offer to buy it at RM60 psf. With the consent from Dato' Low, I wrote this letter dated 21.7.2014.
>
> Q7. Do you have a copy of the feasibility study that you just mentioned?
>
> A7. Yes, but I am unable to produce the papers because the contents are highly confidential. These papers are Ivory's business secret and trade secret.

[56] In addition thereto, the following excerpts from the NOP in respect of PW2's answers during cross-examination provide an insight as to why IPGB

was keen to purchase the said land:

Q: This property, were you all going to develop or use it for agriculture purpose?

A: For property development.

Q: The price that you've quoted in your letter, is it for agriculture property or a converted property? Commercial.

A: You mean for the price that I offer?

Q: Yes.

A: Is of course meant for property development.

Q: So for commercial use?

A: Yes.

Q: So this price is in ... that converted to commercial use. A: Yes, correct.

...

Q: So would you offer RM60 psf for an agriculture land?

A: No.

...

Q: The transaction for agriculture land was RM21.50 psf. So, if it was agriculture land, what would your price for offer be?

...

A: First of all, as I said, I need to do a feasibility study. And then I need to inspect the land. Then only I can tell.

...

Q: ... It's agriculture land is being sold to you as agriculture land, would you offer RM60 per square foot?

A: No. That's why I put it subject to terms and conditions in my offer letter.

...

Q: What did you see at the site?

A: Is a flat land ... I think is at the juncture. Is a quite nice piece of shape of land and opposite is a police station and in front is a shop lot three and four ... two and four storey shop lots, if I'm not mistaken ... there's a mall. ... So it's quite vibrant at that area.

...

Q: So you wouldn't enter into within two weeks at RM60 per square foot for agriculture land. Correct?

A: It very much depends.

Q: Put it to out, you would not.

A: It very much depends on how's the progress of the negotiation. If the negotiation is smooth, of course we can make it in two weeks. Because we want this fast also.

Q: Yes. But the thing is, not at RM60 per square foot for agriculture land.

A: When we offer this, we have something in our mind. Ok? We have to be ... this land have to be commercialised. I mean commercial ... it have to be commercial land.

Q: So you wanted the Seller to make it commercial?

A: Yes.'.

[57] During re-examination, PW2 clarified as follows:

Q: ... Why did you, at that time in 2014, offer RM60 on the basis that the land would be commercialised?

A: Ok, we have done our ... my project team has done a feasibility, ok? That feasibility showed to us it's profitable and feasible for that piece of land. And the offer price could be at RM60 and we still make a reasonable profit.

[58] Subsection 52(1) of the NLC provides that for purposes of the NLC, there shall be three categories of land use, namely agriculture, building and industry. Sections 116(1)(a) and (4)(b) of the NLC states that:

116(1) Where any alienated land is subject by virtue of any provision of this Act to the category 'building', the following implied conditions shall, subject to subsection (3), apply thereto:

(a) that, unless on the relevant date such a building already existed on the land, there shall within two years of that date be erected thereon a building suitable for use for one or more of the purposes specified or referred to in subsection (4);

...

(4) The purposes referred to in paragraph (1)(a) are the following:

...

(b) administrative or commercial purposes, ...

[59] In its submissions, the first defendant emphasised the part of PW2's testimony where he said that IPGB will not offer RM60 psf for agriculture land, which is the category of use of the said land at that point in time. From her GOJ, the DR was clearly influenced by this piece of evidence. However, if the DR had considered PW2's evidence in its totality, it is plainly obvious that the offer at RM60 psf was made by IPGB following a feasibility study with the conclusion, by working backwards, that the company could make a reasonable profit from the purchase and development of the said land by erecting buildings for commercial purpose. I should add that PW2's reasons for not being able to produce the feasibility study at the trial are, to my mind, logical and acceptable.

[60] One of the terms and conditions in EPSB's letter (exh P1) is that the sale shall be subject to 'a good and registrable and marketable title to the said Property'. PW2 had explained the features and locality of the said land which

A makes it well-suited for development. When the first defendant entered into the SPA, it was similarly for the purpose of operating the business of shopping centres and departmental stores cum supermarkets. DW2 admitted under cross-examination that there was no major impediment in having the 'subject property converted to commercial use'.

B

[61] Therefore, PW2's evidence that IPGB would have asked the plaintiff to convert the category of use of the said land from agriculture to commercial had the sale gone through is not unusual or startling at all. It is entirely consistent with the practice or decisions made in the business/commercial world. As C argued by the plaintiff, it does not lie in the mouth of the first defendant to then allege that the said land should be valued and sold as agriculture land with absolutely nil consideration on its potential value to be utilised for commercial purposes.

D

[62] In this context, the plaintiff's counsel contended that the correct question to ask is not whether the offer by IPGB was a final offer, but rather, whether the plaintiff could have sold the said land at RM60 psf, a question which John Loius O'Hara had crafted as 'the minimum price the plaintiff E would have sold the property', the answer to which is in the affirmative. It is my considered view that the evidence adduced at the trial on assessment of damages supports the conclusion that RM60 psf is indeed the minimum price that the plaintiff would have sold the said land during the period between 8 August 2014 and 3 May 2016 since that was the sole offer made through exh F P1 dated 22 July 2014 and IPGB was willing to wait up to a maximum of three months only for the private caveat to be removed. Since the private caveat was not withdrawn by the first defendant until 3 May 2016, the plaintiff lost the opportunity to sell the said land to IPGB.

G **[63]** It should additionally be mentioned that learned counsel for the plaintiff had sought to distinguish *Mawar Biru*. In that case, the basis of the claim for damages was that the defendant proprietor suffered loss by his inability to invest the funds from the sale to the third party which he would have placed on fixed deposit in a bank account. The plaintiff caveator argued H that the defendant had suffered no loss. The price to be paid by the third party was almost double the original purchase price indicating that the property had increased in value. Furthermore, the defendant was under no disability in offering the property to the third party under the pre- emption because any success in his action against the plaintiff for breach of contract could have been I satisfied by damages (see *Principles of Malaysia Land Law* at p 404). In the circumstances, the Johor Bahru High Court held at p 340 of the law report that there was no evidence of any property value loss because 'Firstly, the said property is now not offered for sale by the defendant. Secondly, there is no valuation report of whatever nature to indicate the present value of the said

property'. The court then proceeded to examine whether the defendant is entitled to the damages in another form and that is the loss of the use of the balance of the purchase price the defendant would have received from one Chieng Chuang, if not for the caveat. In this respect, the High Court found that the defendant refused to sell or to put his property in the market because he was worried of the outcome of the pending suit between him and the plaintiff in relation to the rescission of the agreement; a reason which was highly unacceptable. Thus, no damages could be awarded as, unless the money was already in hand or will be received under a firm contractual obligation, the defendant suffered no real loss in terms of interest since there is no money or money due in the first place.

[64] One can appreciate the heavy reliance placed by the first defendant in the present appeal to the ratio decidendi in *Mawar Biru*. However, I am of the opinion that there is merit in the distinction drawn by the plaintiff's counsel to the facts in that case as compared to the facts in this appeal. In the latter, apart from the representatives of the parties, witnesses, including registered valuers, had been called to testify and contemporaneous documents were produced in the trial before the DR. The evidence elicited did not show that the scenario was one where there was refusal by the plaintiff to sell or to put the said land in the market for sale.

The third issue analysed by the DR: 'Sama ada plaintif mendapat keuntungan daripada kenaikan harga pasaran hartanah tersebut'

[65] The DR had referred to the evidence given by PW4 and DW1 and concluded as follows:

> 48) ... Setelah meneliti kedua-dua laporan penilaian pakar tersebut, saya mengambilkira harga pasaran Hartanah tersebut pada tahun 2014 daripada laporan kedua-dua pakar yang menunjukkan bahawa harga pasaran pada 10.11.2014 berjumlah RM21.50 per kaki persegi.
>
> 49) Manakala bagi harga pasaran Hartanah tersebut untuk tahun 2016, saya telah mengambilkira pandangan SP4 memandangkan laporan penilaian SD1 hanyalah setakat tahun 2015. Setakat 29.3.2016, 3.5.2016 dan 20.12.2016 harga pasaran bagi Hartanah tersebut adalah berjumlah RM38.20 per kaki persegi.
>
> 50) Berdasarkan analisa di atas, terdapat kenaikan harga pasaran Hartanah tersebut dari RM21.50 kepada RM38.20 per kaki persegi. Nilai harga pasaran di atas adalah berdasarkan status tanah sedia ada iaitu tanah pertanian. Saya tidak mengambilkira harga tawaran yang dibuat oleh Bakal Pembeli pada 21.7.2014 tersebut kerana SP2 mengesahkan bahawa harga RM60 per kaki persegi tersebut adalah untuk status tanah komersial. Memandangkan status Hartanah tersebut sehingga tarikh prosiding taksiran ini masih kekal sebagai tanah pertanian, maka pendekatan yang diambil untuk menentukan harga pasaran Hartanah tersebut adalah juga berdasarkan status tanah pertanian.

> 51) Justeru itu, saya bersetuju dengan hujahan Peguam Defendan Pertama bahawa Plaintif sebenarnya mendapat keuntungan daripada kenaikan harga pasaran Hartanah tersebut dari tahun 2014 ke 2016. Walaubagaimanapun, Plaintif telah tidak membuat sebarang initiatif untuk menjual atau memasarkan penjualan Hartanah tersebut mahupun selepas Kaveat Defendan Pertama tersebut telah ditarikbalik ...

[66] The first defendant naturally submitted that the DR had rightfully ruled that the plaintiff had benefitted from the price appreciation of the said land.

[67] Speaking for myself, I need not delve too deep into this particular issue in view of my findings as aforesaid and to be found in the succeeding paragraphs, especially concerning the plaintiff's claim for the diminution of the value of the said land, except to make two points.

[68] Firstly, the DR appears to have overlooked the evidence by PW2 and PW3 that after the private caveat was withdrawn, there were enquiries about the said land but nothing firm came out of these since the property market had underwent a downward trend. It is an established fact that the plaintiff could not commit to selling the said land to IPGB due to the existence of the private caveat on the said land and by the time the same was withdrawn, there was no ready market or buyer anymore.

[69] Secondly, as submitted by Dato' Lim Choon Khim, regardless of whether there was an appreciation of the estimated value of the said land with reference to the valuation reports prepared by PW4 and DW1, the fact remains that the plaintiff could no longer sell the said land at RM60 psf and this is the loss suffered by the plaintiff for which it is now claiming compensation.

The amount of compensation that the first defendant is liable to pay the plaintiff

[70] Following from the above analysis of the issues arising in this appeal, in my view, the plaintiff has proven its claim for:

(a) interest which it could have earned on the sale of the said land to IPGB but for the private caveat entered by first defendant. PW3 had explained that the plaintiff has a fixed deposit account at United Overseas Bank Bhd ('UOB') and the interest rate given by UOB as at July 2014 was 3.1%pa. Thus, for purposes of computing the interest which could have been earned, the plaintiff had used the same rate of 3.1%pa. On this score, I am in agreement with the submission by learned counsel for the plaintiff that there was no credible rebuttal evidence from the first defendant as to what would otherwise be the appropriate bank interest

rate at the material point of time. Under the circumstances, I accepted the full calculation put forth by the plaintiff as per para 26(a), (b) and (c) of this judgment; and

(b) expenses incurred in obtaining a report and valuation of the property in the amount of RM99,269 being the professional fee and reimbursements as per the invoice by Henry Butcher Malaysia (Kedah) Sdn Bhd dated 11 May 2017 (exh P5).

[71] However, I did not come to the same conclusion in respect of the plaintiff's claim for the diminution of the value of the said land in the amount of RM9,190,560. The plaintiff contended that the evidence by PW2 and PW3 supports this claim. PW2 testified that by the time the private caveat was withdrawn, the market had declined and it would be risky to purchase the said land for commercial development. PW3 said that although there were enquiries on the said land after the withdrawal of the private caveat, no offers to purchase the same were forthcoming; to quote his exact words, 'Now market is bad, nobody offered.'. PW3 further testified that the said land has gone down in value since they received the offer from EPSB, that is from RM52,690,560 as per exh P1 to RM43,500,000 as valued by PW4 as per exh P4. Therefore, it was argued that the diminution of the value of the plaintiff's land for the period between 8 August 2014 and 3 May 2016 is the difference between the two figures as abovementioned ie RM9,190,560.

[72] During the cross-examination of PW3 by Mr R Jayasingam, learned counsel had suggested to the witness twice that the plaintiff can claim either the loss of value or loss of interest but not both, to which PW3 disagreed. In the first defendant's submissions, the judgements in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; *Coke & Coal Products (M) Sdn Bhd v Hon Swee Kong & Ors* [1999] 4 MLJ 453; *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; and especially *Mawar Biru* and *Othman bin Ali & 290 Lagi v Bukit Lenang Development Sdn Bhd* [2016] MLJU 242; [2016] 6 CLJ 508 were relied upon for the principle of law that the award of damages is not to enrich or confer an additional benefit on a party at the expense of the other party. It was also submitted that *Mawar Biru* and *Othman Ali* advocate the added principle that a party seeking damages should not obtain a monetary reward as a means to make profit.

[73] In support of the claim for the diminution of the value of land in the amount of RM9,190,560, it is noted that only one authority was cited by the plaintiff, namely *Hollebone v Midhurst and Fernhurst Builders Ltd and Eastman and White of Midhurst Ltd* [1968] 1 Lloyd's Rep 38. Having read report of the judgment, I find that the factual matrix in that case and in the appeal before me can be distinguished. In *Hollebone*, the plaintiff's house caught fire due to the admitted negligence of a workman employed by the second defendant ie it was

an action in tort. The second defendant admitted liability but contended that with regard to damage to the house itself, damages should be based on the difference between the value before the fire and after the fire. At p 40 of the report, His Honour Norman Richards QC, Offical Referee had this to say:

> I now turn to the observations in the textbooks. In Salmond on Torts, 11th ed (1953), at p 240, it is stated that where trespass has caused physical damage to land — and there is no difference whether the tort be in trespass, nuisance, or negligence — the measure of damage is not the cost of reinstatement. In Mayne and Mc Gregor on Damages, 12th ed (1961), at p 635, it is stated that in torts affecting land, the normal measure of damages is the amount of the diminution of the value of the land, and in Street on Damages, at p 201, the author states that in actions relating to loss and damage to land and structures, the Courts are reluctant to apply the test of replacement.

[74] After reviewing a number of English cases referred to him, the Official Referee finally held '(1) that, on the facts of this case the plaintiffs' house was unique and plaintiffs acted reasonably in having damage made good; that those authorities relied on for the statement that measure of damage was not cost of reinstatement could be distinguished on their facts or conflicted with other authorities which were to be preferred where cost of repair or replacement was held to be the proper measure of damage; and that, therefore, in this case, correct measure of damages was cost of repair'.

[75] In contrast, the damages claimed by the plaintiff in this appeal is not pursuant to a cause of action in tort but is premised on a statutory remedy provided under sub-s 329(1) of the NLC. The purpose of damages in the present context is to compensate the plaintiff and not to cause an unjust enrichment to the plaintiff. Since this court is minded to allow the plaintiff's claim for interest which it could have otherwise earned but for the private caveat entered by the first defendant, the plaintiff's claim for the diminution of the value of land was not allowed lest the plaintiff would then reap a windfall at the expense of the first defendant.

[76] Before I end, I should make one final reference to the first defendant's supplementary submission dated 18 March 2019 where it was correctly pointed out that 2% of the selling price, which I have calculated amounts to RM1,053,811.20, was payable as agency fee/commission to the property agent, and not 'from the initial 10% purchase price' as submitted in para 11 of the plaintiff's supplementary written submission dated 8 March 2019.

[77] In the upshot, the DR erred in law and in fact in arriving at her findings and this warrants the appellate intervention of this court.

CONCLUSION

[78] Premised on the reasons as stated above, the plaintiff's appeal is allowed. The DR's decision on 16 August 2018 is set aside. I allowed the plaintiff's assessment of damages for a sum of RM2,410,074.53 and ordered cost of RM20,000 to be paid to the plaintiff for the assessment proceedings before the DR and this appeal.

Appeal allowed; DR's decision set aside and plaintiff's assesement of damages in the sum of RM2,410,074.53 allowed.

Reported by Ashok Kumar